Office - Supreme Court, U.S.
FILED
NOV 1 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-475

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORTHERN ELECTRIC COMPANY, A DIVISION OF SUNBEAM CORPORATION,
Petitioner,

v.

ROSE HARRELL, ON BEHALF OF HERSELF AND ALL PERSONS SIMILARLY SITUATED,
Respondent.

On A Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

ALISON STEINER
(Counsel of Record)
ANDALMAN, ADELMAN & STEINER, P.A.
224 Second Avenue
Post Office Box 368
Hattiesburg, Mississippi 39401
Telephone: (601) 544-8291

MARTHA BERGMARK
Post Office Box 1728
Hattiesburg, Mississippi 39401
Telephone: (60 545-2950

Counsel for Respondent
Rose Harrell, on behalf of herself and all persons similarly situated

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly applied disparate impact analysis to a Title VII class action challenge to a discretely identified employee selection system where prospective employees were allegedly evaluated with reference to facially neutral criteria including degree of prior experience, educational attainment, and skill level.

2. Whether the Court of Appeals properly applied this Court's decision in *Pullman-Standard* v. *Swint*, U.S. ____, 102 S.Ct. 1781, 72 L.Ed. 2d 166 (1982) when it set aside District Court fact findings which were completely devoid of factual support in the record.

3. Whether the Court of Appeals properly declined to remand the case to the District Court for further fact finding when the District Court had analyzed the case under an improper legal standard and where the factual issues relevant to determining liability under the proper legal standard were capable of only one resolution.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Authorities	iv
Statement of the Case	1
Reasons for Denying the Writ	4
I. The Court Of Appeals Decided *Harrell* Under The Legal Standard Appropriate To Its Facts.	4
A. *Harrell* Is Not Inconsistent With Supreme Court Precedent.	4
B. *Harrell* Does Not Pose A Conflict With Other Circuit Courts Of Appeals Decisions.	6
C. The Fifth Circuit Properly Treated *Harrell* As Fully Consistent With Other Fifth Circuit Decisions.	8
D. The Findings Made By The Court Of Appeals Also Sustain A Determination Of Discrimination Under A Disparate Treatment Theory.	10
II. The Court Of Appeals Properly Reaffirmed Its Decision In *Harrell* After Re-Examining The Case Under *Pullman-Standard* v. *Swint*, ___ U.S. ___ 102 S.Ct. 1781, 72 L.Ed. 2d 66 (1982).	12

III. The Court Of Appeals Properly Determined That Discrimination Had Occurred In This Case And Correctly Remanded The Matter To The District Court Solely For The Formulation Of The Appropriate Remedy. 15

Conclusion 17

Certificate of Service 18

TABLE OF AUTHORITIES

Cases

Brown v. Illinois, 422 U.S. 590 (1975) 16

Casteneda v. Partida, 430 U.S. 482 (1977) 11,13

Connecticut v. Teal, ____ U.S. ____, 102 S.Ct. 2525, 73 L.Ed. 2d 30, (1982) 6

Croker v. Boeing Co., 662 F.2d 975 (3rd Cir. 1981) 7

Fisher v. Proctor & Gamble Manufacturing Co., 613 F.2d 527 (5th Cir. 1980), cert denied, 449 U.S. 1115 (1981) 5

Furnco Construction Company v. Waters, 438 U.S. 567 (1978) 5

Grant v. Bethlehem Steel Corp., 635 F.2d 1007 (2nd Cir. 1980), cert. denied, 452 U.S. 938 (1981) 5

Griggs v. Duke Power Company, 401 U.S. 424 (1971) .. 4,5,6

Harrell v. Northern Electric Co., 672 F.2d 444 (5th Cir. 1982), on rehearing, 679 F.2d 31 (5th Cir. 1982) ...2,3,6,7, 8,9,10,11,14,17

Hazelwood School District v. The United States, 433 U.S. 299 (1977) 11,13

Heagney v. University of Washington, 642 F.2d 1157 (9th Cir. 1981) 6,7

International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977) 7,9

Johnson v. Uncle Ben's Inc., 657 F.2d 750 (5th Cir. 1981) 10

Kirby v. Colony Furniture Co., 613 F.2d 696 (8th Cir. 1980) 5

McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) 5,6

Mortensen v. Callaway, 672 F.2d 822 (10th Cir. 1982) .. 6,7

Payne v. Travenol Laboratories, Inc., 673 F.2d 798 (5th Cir. 1982) 8,9,10,11,12

Pope v. City Of Hickory, N.C., 679 F.2d 20 (4th Cir. 1982) 6,7

Pouncy v. Prudential Insurance Company of America, 668 F.2d 795 (5th Cir. 1982) 8,9,10

Pullman-Standard v. Swint, ____ U.S. ____, 102 S.Ct. 1781, 72 L.Ed. 2d 66 (1982) 3,12,13,14,16

Reynolds v. Sheet Metal Workers Local 102, 25 FEP 837 (D.C.Cir. 1981), [affirming 498 F.Supp. 952 (DCDC, 1980)] 4

Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972) 5

Singleton v. Wulff, 428 U.S. 106 (1976) 16

Sledge v. J. P. Stevens Co., 585 F.2d 625 (4th Cir. 1978), cert. denied, 440 U.S. 981 (1979) 5

Stewart v. General Motors Corporation, 542 F.2d 445 (7th Cir. 1976), cert. denied, 443 U.S. 919 (1977) .. 5

Taylor v. Teletype Corporation, 648 F.2d 1129 (8th Cir.) cert. denied, 102 S.Ct. 515 (1981) 7,8

United States v. United States Gypsum Company, 333 U.S. 364 (1948) 13

Williams v. Colorado Springs School District, 641 F.2d 835 (10th Cir. 1981) 5

Statutes

Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e, *et seq.* 1,3,4,6,9

Court Rules

Federal Rules of Appellate Procedure:

Rule 28(j) 9

Rule 35(a) 8

Federal Rules of Civil Procedure:

Rule 41(b) 2

Rule 52 12

Fifth Circuit Rules:

Rule 16 8

No. 82-475

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORTHERN ELECTRIC COMPANY, A DIVISION
OF SUNBEAM CORPORATION,
Petitioner,

v.

ROSE HARRELL, ON BEHALF OF HERSELF
AND ALL PERSONS SIMILARLY SITUATED,
Respondent.

On A Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

Rose Harrell, plaintiff-respondent, brought this class action in the United States District Court for the Southern District of Mississippi on April 21, 1978 alleging that defendant-petitioner Northern Electric Company (hereinafter NECO) discriminated against her and similarly situated Blacks in selecting clerical employees for its Hattiesburg Mississippi plant in violation of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e, *et seq.* The District Court certified a class of "all qualified Negro persons who applied for employment in clerical positions with the defendant and who were not hired in a

clerical position because of their race" and ordered that the trial proceed on a bifurcated basis.

The liability issue was tried on two days in July and one day in August, 1980 before United States District Court Judge William Harold Cox who, at the close of all the evidence granted NECO's Fed. R. Civ. P. 41(b) Motion to Dismiss both the individual and class claims (Pet. App. A-8). Harrell appealed this decision to the United States Court of Appeals for the Fifth Circuit which, on April 5, 1982 reversed the District Court with respect to both claims, rendered judgment of liability in favor of the plaintiff and her class, and remanded for trial as to relief (Pet. App. B), *Harrell* v. *Northern Electric Co.*, 672 F.2d 444 (5th Cir., 1982).

The Court of Appeals analyzed Harrell's individual claim under a "disparate treatment" theory, concluded that the District Court's determination concerning the claim was factually clearly erroneous and legally in error and reversed and rendered. Petitioner NECO does not seek review of that determination by this Court.

In reversing the District Court with respect to the class claim, the Court of Appeals first determined that the class claim should be evaluated under a "disparate impact" theory and, using stipulated facts, ascertained that "the disparity between the percentage of blacks applying and those hired, considered in light of the total circumstances found in the record, is sufficient to raise a prima facie case of class discrimination" (Pet. App. B-7) 672 F.2d at 447. The Court of Appeals then examined NECO's attempts at statistical refutation of the prima facie case and concluded that the District Court's fact finding which undergirded the only possible statistical challenge to Harrell's prima facie class case was clearly erroneous (Pet. App. B-10),

672 F.2d at 448.[1] The Court of Appeals finally concluded that, under the circumstances of the case, the record also failed to reveal any legitimate business justification for the challenged practices sufficient to refute the prima facie case (Pet. App. B-11), 672 F.2d 449.

The Court of Appeals remanded the case to the District Court for trial as to damages with instructions that the chief judge reassign the case to a judge other than the original trial judge (Pet. App. B-16), 672 F.2d at 450.

NECO filed a Petition for Rehearing and a Suggestion for Rehearing En Banc. On June 21, 1982, the panel, per curiam, on the Petition for Rehearing, re-examined its decision in light, *inter alia,* of this Court's intervening decision in *Pullman-Standard* v. *Swint,* ____ U.S. ____, 102 S.Ct. 1781, 72 L.Ed. 2d 66 (1982), and reaffirmed its previous decision.[2] The Suggestion for Rehearing En Banc was denied (Pet. App. C), 679 F.2d 31 (5th Cir. 1982).

---

[1] The question was whether or not four black jobs seekers were made offers of clerical employment. The issue looms large in the arguments contained in the Cert Petition (Cert. Pet. pp19-22) because it is only when *all four* of these offers are deemed to have been made *and* thirty-eight other stipulated fillings of clerical vacancies are simultaneously disregarded that Petitioner can argue that its own attempt at statistical refutation ekes in under the "two to three standard deviation" measure used in Title VII analysis. Under any other test for statistical significance of the stipulated applicant flow data, significant statistical disparity is established, 672 F.2d at 448.

[2] The Court of Appeals did recall judgment it had previously rendered on behalf of three non-plaintiff class members, agreeing that action was inconsistent with the bifurcated status of the litigation. Neither party contests this determination here.

REASONS FOR DENYING THE WRIT

I. The Court Of Appeals Decided *Harrell* Under The Legal Standard Appropriate To Its Facts.

A. *Harrell* Is Not Inconsistent With Supreme Court Precedent.

Petitioner NECO asks this Court to consider the question of whether the "disparate impact" theory first defined in *Griggs* v. *Duke Power Company,* 401 U.S. 424 (1971), can properly be used where there is "no allegation or evidence of an identifiable practice ... which, although neutral on its face, allegedly falls more harshly on a minority group." It also suggests that the Court of Appeals decided this question inconsistently with Supreme Court precedent.

Respondent submits that under its facts the instant case simply does not present that question and that the precedent of this Court cited by Petitioners is fully consistent with the Court of Appeals decision.

In this case, the Court of Appeals specifically found that the lawsuit does challenge a clearly identifiable neutral employment practice: use of an all-white interviewing and evaluating staff subjectively to determine relative qualifications of competing job candidates with reference to neutral criteria including skill level, prior experience, work record, knowledge, education and seniority (Pet. App. B-10-11), 672 F.2d at 448.

Petitioner's real assertion appears to be that this readily identifiable practice may not, despite its disparate effect upon minorities, be challenged under a disparate impact theory simply because it is tainted with subjectivity. This argument attempts to make a virtue out of vice. Employee selection systems so tainted have consistently been evaluated—and condemned—by courts utilizing the disparate impact Title VII analysis. *See Reynolds* v.

Sheet Metal Workers Local 102, 25 FEP 837 (D.C. Cir., 1981), [affirming 498 F.Supp. 952 (DCDC, 1980)]; *Williams* v. *Colorado Springs School District*, 641 F.2d 835 (10th Cir., 1981); *Fisher* v. *Proctor & Gamble Manufacturing Co.*, 613 F.2d 527 (5th Cir. 1980), cert. denied, 449 U.S. 1115 (1981); *Grant* v. *Bethlehem Steel Corp.*, 635 F.2d 1007 (2nd Cir., 1980), cert. denied, 452 U.S. 938 (1981); *Kirby* v. *Colony Furniture Co.*, 613 F.2d 696 (8th Cir., 1980); *Sledge* v. *J. P. Stevens Co.*, 585 F.2d 625 (4th Cir., 1978), cert. denied, 440 U.S. 981 (1979); *Stewart* v. *General Motors Corporation*, 542 F. 2d 445 (7th Cir. 1976), cert. denied, 443 U.S. 919 (1977); and *Rowe* v. *General Motors Corp.*, 457 F.2d 348 (5th Cir., 1972).

Petitioner seeks support for its position that the practice challenged in this lawsuit may not be analyzed under a disparate impact theory in this Court's decision in *Furnco Construction Company* v. *Waters*, 438 U.S. 567 (1978). Respondent submits that Petitioner's reliance is misplaced. *Furnco* addressed the issue of an employers rebuttal burden when a prima facie disparate treatment case had been made under *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). The reason stated by the Court for rejecting use of a disparate impact test in *Furnco* was that both the District Court and the Court of Appeals had concluded that there had been no showing that the challenged hiring practices had the requisite disproportionate impact on minorities, *Furnco*, 438 U.S. at 571-72.

As the *Furnco* separate opinion points out, nothing in *Furnco* limits the *scope* of the practices which may be challenged under *Griggs* — indeed, use of prior experience as an employment criterion is specifically cited as "practice" challengeable under *Griggs*, *Furnco*, 438 U.S. at 583. The dissent disagrees only with the Court's conclusion that the *factual* question concerning whether or note a disparate impact actually existed had been finally resolved, *Ibid*, 438 U.S. at 584-5.

This Court's most recent examination of Title VII "disparate impact" analysis, *Connecticut* v. *Teal*, ____ U.S. ____, 102 S.Ct. 2525, 73 L.Ed. 2d 30, (1982), similarly declines to adopt Petitioner's restrictive definition of what "built-in headwinds to minority employment" may be challenged under a disparate impact theory, citing with approval legislative history referring to discriminatory supervisory ratings as an example of devices challengable under *Griggs*, *Connecticut* v. *Teal*, ____ U.S. at ____, n.10, 73 L.Ed. 2d at 139, n.10.

The *Teal* dissent also lends no support to Petitioner's restrictive interpretation of what practices may be examined under a disparate impact analysis: "[O]ur disparate impact cases consistently have considered whether the result of an employers *total selection process* had an adverse impact upon the protected group," ____ U.S. at ____, 73 L.Ed. 2d at 144.

B. *Harrell* Does Not Pose A Conflict With Other Circuit Courts Of Appeals Decisions.

Petitioner's assertion that *Harrell* is in conflict with the decisions of other Courts of Appeals is again founded on Petitioner's misconstruction of the issues actually presented and decided under *Harrell's* facts. None of the purportedly conflicting cases involves *Harrell's* class based challenge to a single clearly identifiable and discrete practice whereby relative employment qualifications are determined subjectively but with reference to neutral criteria.

Heagney v. *University of Washington*, 642 F.2d 1157 (9th Cir. 1981), *Pope* v. *City of Hickory, N.C.*, 679 F.2d 20 (4th Cir. 1982), and *Mortensen* v. *Callaway*, 672 F.2d 822 (10th Cir. 1982) are individual actions involving no class allegations. They incorporate disparate impact theory only as a collateral means to bolster individual claims of disparate treatment under the traditional *McDonnell-Douglas* test.

In *Heagney*, the only "impact" claim was based on comparing the category into which plaintiff's job had been classified with other job categories. However, the evidence showed that the factual basis for plaintiff's discrimination claim related to distinctions made between pay received by men and women *within* the Plaintiff's job category.

In *Pope*, a discharge claim, the "impact" theory raised was rejected on the basis that the statistical samples presented were too small for meaningful statistical evaluation, a necessary prerequisite to a showing of disparate impact. Additionally, there was no evidence of a specific practice or method of employee discharge which allegedly fell more harshly on Pope and other blacks than on whites.

In *Mortensen*, the record was likewise devoid of any showing that a practice comparable to the interviewing process in *Harrell* actually resulted in a disparate underrepresentation of women in the position Mortensen claimed she was discriminatorily denied.

Croker v. *Boeing Co.*, 662 F.2d 975 (3rd Cir. 1981) and *Taylor* v. *Teletype Corporation*, 648 F.2d 1129 (8th Cir.) cert. denied, 102 S.Ct. 515 (1981), are the only class actions cited by Petitioner and they also fail sweepingly to reject the disparate impact analysis in *Harrell* type factual situations.

Factually, *Croker* presents a classic *International Brotherhood of Teamsters* v. *U.S.*, 431 U.S. 324 (1977) case: an across-the-board pattern and practice "disparate treatment" challenge to a wide range of Boeing's employment practices. It is thus distinguishable from *Harrell* on its facts alone. Moreover, the *Croker* Court follows *Teamsters* and agrees with *Harrell* in acknowledging that "either [a treatment or impact] theory may be aplied to a set of facts," 662 F.2d at 991, and in fact reviews the class claims raised by the suit under the impact theory as well. ("With *these* standards of proof in mind we will

proceed to examine the employees contentions ..." [emphasis added]), 662 F.2d at 991.

In *Taylor,* a class based challenge to Teletype Corporation's demotion practices, the only statistical presentation concerning discrimination that was sufficiently refined to be of probative value did not deal directly with the challenged demotions. Rather, the statistics indirectly created inferences respecting demotions through an analysis of *layoffs,* 648 F.2d at 1133-4. The direct showing of "practice-yields-impact" made in *Harrell* was simply not made in *Taylor* and the cases are thereby readily distinguishable from each other.

Respondent submits that in light of the crucial differences between *Harrell* and the cited cases, the purported conflict among the Circuits claimed by the Petitioner is not sufficient to necessitate review of the *Harrell* decision by this Court.

C. The Fifth Circuit Properly Treated *Harrell* As Fully Consistent With Other Fifth Circuit Decisions.

Petitioner next makes the suggestion this Court should grant the requested writ in order to resolve a purported conflict within the Fifth Circuit between the decision in *Harrell* and the decisions in *Pouncy* v. *Prudential Insurance Company of America,* 668 F.2d 795 (5th Cir. 1982) and *Payne* v. *Travenol Laboratories, Inc.,* 673 F.2d 798 (5th Cir. 1982).

Ordinarily, settling claims of intramural conflict is the office of the Court of Appeals sitting on *en banc,* Fed. R. App. Pr. 35(a), 5th Cir. R. 16. Indeed, as petitioner points out, the claimed conflict was raised by petitioner in a suggestion for rehearing *en banc* to the Fifth Circuit, which suggestion was declined (Cert. Pet. p. 15, n.6)

Petitioner interprets the denial of *en banc* review as a failure to resolve the stated conflict. Respondent submits that, on ex-

amination of the decisions, the denial of *en banc* review is better viewed as a determination that no such conflict exists.[3]

In *Pouncy,* the first case claimed to be in conflict with *Harrell,* the Fifth Circuit simply and properly follows this Court's settled rule that across the board challenges to an entire range of employment practices are appropriately treated under a *Teamsters* "pattern and practice" disparate treatment theory. In *Pouncy,* the class claim is that Prudential had "discriminated against its black employees as a class by systematically failing to ... [afford] them the same conditions of employment as [are] given whites" 668 F.2d at 797.

By contrast, in *Harrell,* the class claim is that, by a specific identifiable procedure, NECO discriminatorily denied blacks one particular thing — clerical jobs.

In addressing the proper use of the disparate impact Title VII analysis, *Pouncy* simply identifies the essential elements that a practice challenged under a disparate impact theory must have: 1) The challenged practice must be defined with enough specificity that its causal relationship to a statistical work force imbalance is demonstrable, 668 F.2d at 801; and 2) The challenged practice must be sufficiently identifiable that the

---

[3] The Court below had the allegation or conflict before it several times in addition to the request for *en banc* review. NECO drew *Pouncy* to the attention of the panel considering *Harrell,* prior to issuance of the initial decision, by letter submitted under Fed. R. App. Pr. 28(j). The claimed conflicts with *Pouncy* and *Payne* were also raised with the panel in the petition for panel hearing filed simultaneously with the suggestion for rehearing *en banc.* The cases are presumably among the "other authorities cited" in whose light the panel re-examined and affirmed its original holdings (Pet. App. C-2), 679 F.2d at 31.

employer may defend itself by showing legitimate job related business justifications for the practice 668 F.2d at 802.[4]

Obviously, *Pouncy's* allegation of a systematic failure to treat blacks the same as whites does not meet either of the foregoing elements. On the other hand, the practice challenged in *Harrell* satisfies both.

The purported conflict with *Payne* v. *Travenol Laboratories, supra,* is similarly unfounded. Petitioner alleges a conflict between *Harrell* and the statement in *Payne* that Travenol's interviewing could not be viewed as a neutral practice with a disparate effect (Cert. Pet. p.14). This assertion disregards a crucial factual distinction between *Payne* and *Harrell:* There is, in *Payne,* "[no assertion], that Travenol applied distinct, facially neutral criteria to candidates in the interview that operate disproportionately to exclude blacks" 673 F.2d at 816. In *Harrell,* the Court of Appeals identified six such criteria (Pet. App. B-10) 672 F.2d at 450.

D. The Findings Made By The Court Of Appeals Also Sustain A Determination Of Discrimination Under A Disparate Treatment Theory.

Contrary to Petitioner's assertions in Argument IV of its petition, the findings of the Court of Appeals in *Harrell* could also support a conclusion that discrimination was proven under a disparate treatment analysis as well as under a disparate impact analysis.

---

[4] It is instructive to note that the *Pouncy* decision cites *Johnson* v. *Uncle Ben's, Inc.,* 657 F.2d 750 (5th Cir. 1981) as a proper disparate impact case, thus throwing some question on petitioner's implication that because *Harrell* is similar to *Johnson* it is "contrary to *Pouncy* and *Payne*" (Cert. Pet. p. 14 n. 5).

Petitioner's initial argument, that the statistical disparity proven must *exceed* the two to three standard deviation level set forth in *Hazlewood School District* v. *The United States,* 433 U.S. 299 (1977) and *Casteneda* v. *Partida,* 430 U.S. 482 (1977), to make out a prima facie case of classwide disparate treatment is simply unsupported. Indeed, Petitioner acknowledges that *Hazlewood* is a proto-type disparate treatment case. At most, where the statistical proof is inconclusive, additional, non-statistical proof from which the requisite inference of intentional discrimination may be drawn may be necessary to sustain a plaintiff's ultimate burden of persuasion. The Court of Appeals in the instant case points to such additional proof, noting in its discussion of the class case that the non-statistical proof was also probative of discrimination and discussing in detail the intentional discrimination against three specific class members (Pet. App. D-11-16), 672 F.2d at 449-50.

Petitioner's second argument, that the Court of Appeals presented it with an "impossible" standard of rebuttal, is similarly without merit. *Harrell* does identify a specific practice and shows where it directly results in disparate minority hiring.

The problem with NECO's attempt at rebuttal is not that the Court of Appeals held it to an impossible standard. Rather, as the Court of Appeals' decision makes clear, the evidence adduced was simply insufficient to meet any rebuttal standard, including the standard of rebuttal under a classwide disparate treatment case. In such a case a defendant has two options; either present a credible statistical rebuttal to the plaintiff's case or offer legitimate job related and non-discriminatory reasons for the actions challenged as discriminatory, see *Payne* v. *Travenol Laboratories, Inc., supra.*

In *Harrell,* the Court of Appeals found specifically that NECO had not only failed at its attempts to refute the statistics

but had also failed to show any legitimate reason for its failure to hire blacks. (Pet. at B-10-11) 672 F.2d 448-9. These findings would be sufficient to sustain a conclusion of class based discrimination under a disparate treatment theory, see *Payne, supra.*

II. The Court Of Appeals Properly Reaffirmed Its Decision In *Harrell* After Re-Examining The Case Under *Pullman-Standard* v. *Swint*, ____ U.S. ____ 102 S.Ct. 1781, 72 L.Ed. 2d 66 (1982).

In *Pullman-Standard* v. *Swint, supra,* this Court reversed a decision of the Fifth Circuit Court of Appeals for improperly failing to use the "clearly erroneous" standard in reviewing District Court findings concerning a pure question of fact. In that case, the Court of Appeals had improperly set aside a District Court fact finding respecting discriminatory intent without first ascertaining and determining that the District Court's finding of fact was clearly erroneous under Fed. R. Civ. Pr. 52.

In the instant case, petitioner argues that *Swint* has been given short shrift because the Court of Appeals *did* use a clearly erroneous standard. This contention is not supported by the facts or the law.

Swint reaffirms three basic principles respecting use of the clearly erroneous rule: First, the clearly erroneous rule must be applied by Courts of Appeals when reviewing District Court findings respecting all pure fact questions—regardless of whether the question is one of "ultimate" or "subsidiary" fact, ____ U.S. ____ at ____ 72 L.Ed. 2d at 79.

Second, the clearly erroneous rule does not apply to conclusions of law and therefore, if a Court of Appeals finds that a District Court's fact findings rest on an erroneous view of the

law they may be set aside on that basis. ____ U.S. ____ at ____, 72 L.Ed. 2d at 79.

Third, if the clearly erroneous rule is applicable and the question being examined is a pure question of fact, the Court of Appeals may not set aside a District Court finding simply because the District Court "*might* have reached another conclusion," ____ U.S. ____ at ____, 72 L.Ed. 2d at 81. This third teaching is simply a restatement of the longstanding principle that a District Court's fact findings may only be set aside when there is no support for the finding in the record or where "on the entire evidence [the appellate court] is left with a definite and firm conviction that a mistake had been committed", *United States* v. *United States Gypsum Company*, 333 U.S. 364, 395 (1948).

Petitioner's only objection under *Swint* appears to be that the Court of Appeals somehow violated the third teaching. This contention is unfounded.

The Court of Appeals held, and, indeed, petitioner must concede, that under the statistical standards set forth in *Hazelwood, supra,* and *Casteneda,* the plaintiff in this case made out a prima facie case of discrimination unless the District Court had properly employed a statistical analysis which both *excluded* 38 persons who had obtained initial clerical jobs by transferring from other positions at NECO and *included* four black people who were purportedly offered, but rejected, clerical jobs (Cert. Pet. p.21-22), 672 F.2d 447-8, see also Footnote 1, *supra.*

Properly ascertaining that the question of exclusion of the transfers did not make a legally significant statistical difference unless the inclusion of the four purported clerical offers was proper, the court of Appeals focused on the District Court's

fact finding regarding the offers, (Pet. App. B-7-8), 672 F.2d at 447.[5]

The Court of Appeals recognized that the determination of whether or not clerical job offers were made to four black applicants was a pure question of fact. In conformity with *Swint*, therefore, it used the clearly erroneous standard of review and found that "the record is devoid of credible evidence that any of the four were offered clerical employment" (Pet. App. B-8), 672 F.2d at 447. On the basis of this conclusion, the Court of Appeals held that the trial court's finding that all four of these applicants had been offered clerical employment was clearly erroneous (Pet. App. B-10), 672 F.2d at 449.

Far from disregarding or violating the letter or spirit of *Swint*, the Court of Appeals in *Harrell* not only clearly and specifically used the clearly erroneous rule in its initial decision, but it also reviewed its original opinion after *Swint* came down and reaffirmed its decision in light of *Swint* (Pet. App. C), 679 F.2d 31.

Respondent submits that this conclusion was fully in line with this Court's opinion in *Swint* and that there is thereby no basis for granting the Writ sought by petitioner.

---

[5] The Cert Petition contains an extensive discussion of what "the record" purportedly shows in this regard (Cert. Pet. pp. 19-22, nn. 10, 12). As Appendices A and B to the Cert Petition reveal, these allegations go far beyond what the District Court found in this regard and are in fact directly contrary to conclusions reached by the Court of Appeals which examined the entire transcript in this matter.

III. The Court Of Appeals Properly Determined That Discrimination Had Occurred In This Case And Correctly Remanded The Matter To The District Court Solely For The Formulation Of The Appropriate Remedy.

Petitioner's final argument concedes, *per arguendo*, that the District Court applied an improper legal standard and that the Court of Appeals employed the proper one. Petitioner nonetheless argues that this Court should grant the Writ of Certiorari simply because the Court of Appeals directed entry of judgment of liability rather than remanding the case to the District Court for new findings of fact respecting liability.

This argument is founded on two mistaken assertions: 1) That the disparate impact theory on which the Court of Appeals based its decision had not been raised by the plaintiff before the District Court; and 2) That the record respecting liability, once the clearly erroneous fact findings of the District Court had been set aside, permitted more than one resolution of the factual issue.

As the Court of Appeals found on the basis of uncontroverted evidence, the disparate impact theory has been an issue since the case was first considered by the Equal Employment Opportunity Commission (Pet. App. B-4-5) 672 F.2d at 446. The plaintiff's complaint specifically pleaded the EEOC's determination relative to the impact issue and her trial briefs strenuously argued the disparate impact class claim. Petitioner's assertions to the contrary are simply unsupported.[6]

---

[6] In accordance with his usual procedures, the District Court Judge who tried this case did not hold a pre-trial conference or enter a pre-trial order. Thus, the pleadings and the Briefs are the only indicia of the issues before the District Court.

Despite the fact that it was asserted, the District Court chose not to use the disparate impact theory in deciding the case. The Court of Appeals found this to be the chief error of law made by the District Court.

This Court has consistently held that determination of when issues may be resolved on appeal without a remand to the District Court is to be "left primarily to the discretion of the Court of Appeals to be exercised on the facts of the individual cases" *Singleton* v. *Wulff*, 428 U.S. 106, 121 (1976). In general, where the record is sufficient to support the Appellate Court's legal analysis, and the facts in the record are capable of only one resolution, the Appellate Court may properly exercise its discretion and resolve issues not previously passed on by the trial court, *Brown* v. *Illinois*, 422 U.S. 590 (1975), *Pullman-Standard* v. *Swint, supra*, ____ U.S. at ____; 72 L.Ed. 2d at 82.

In the instant case, the Court of Appeals was well within its discretion in directing entry of a judgment finding liability for employment discrimination on the impact theory.

First, as both decisions of the Court of Appeals make clear, the District Court findings of fact were not set aside merely because they were decided under an erroneous view of the law. The fact findings made by the District Court were found to be clearly erroneous and unsupported by the record. Moreover, the statistical data necessary to determining the existence of a disparate impact were, with the exception of the question of four purported clerical job offers, stipulated by the parties, (Pet. App. B-5) 672 F.2d at 446, and therefore capable of only one factual resolution. As to the four alleged clerical job offers, either the job offers were made or they were not. The Court of Appeals concluded that the finding that the clerical job offers were made was clearly erroneous. Thus, there remained only one possible resolution of that factual issue—the offers were not made.

Also, it should be noted that the Court of Appeals decision does not finally dispose of the class claims. It simply directs entry of judgment of liability on behalf of the class as a whole. The determination of what, if any, relief each individual class member may be entitled to, as well as any generalized injunctive relief, is left for determination by the District Court on remand (Pet. App. B-16) 672 F.2d at 450.

Under the foregoing circumstances, Respondent submits that petitioner's arguments respecting failure to remand are insufficient to warrant review of the *Harrell* decision by this Court.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ALISON STEINER
ANDALMAN, ADELMAN
& STEINER, P.A.
224 Second Avenue
P. O. Box 368
Hattiesburg, MS 39401
601/544-8291

MARTHA BERGMARK
P. O. Box 1728
Hattiesburg, MS 39401
601/545-2950

Counsel for Respondent

CERTIFICATE OF SERVICE

I, Alison Steiner, counsel of record for Respondent, hereby certify that I have caused three copies of the above and foregoing Brief for the Respondent in Opposition, to be served by United States Mail upon counsel of record for Petitioner at the following address:

Walter W. Christy,
Kullman, Lang, Inman & Bee
A Professional Corporation
615 Howard Avenue
Post Office Box 60118
New Orleans, Louisiana 70160

This the 29th day of October, 1982.

Attorney for Respondent